UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAR 24 1969

JAMES TINNEY,
Appellant,

vs.

LAWRENCE E. WILSON, Warden, et al.,
Appellees.

No. 22266

See Vol. 3470

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

FILED

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TO THE HONORABLE OLIVER D. HAMLIN, JR., CHARLES M. MERRILL and WALTER ELY, CIRCUIT JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Pursuant to Rules 35(b) and 40 of the Rules for Appellate Procedure, Title 28, United States Code, appellees, Lawrence E. Wilson and the People of the State of California, hereby petition for a rehearing and suggest a rehearing in banc to reconsider this Court's decision filed in this case on February 28, 1969.

Upon reading this Court's opinion, we wonder what remains in this Circuit of the principle announced in _Ker_ v. _California_, 374 U.S. 23, 34 (1963), that, consistent with the fundamental constitutional criteria of the Fourth

Amendment, the states were free to develop "workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States." That principle, recently reiterated in Sibron v. New York, 392 U.S. 40, 60-61 (1968), has surely been substantially emasculated by the decision in this case.

Our petition for rehearing and request for a rehearing in banc is not submitted simply as a routine matter by another disappointed litigant. We emphatically submit that this Court's decision is in error on a fundamental ground. The Court concluded that, under the Fourth Amendment, the Los Angeles vice control officers did not have sufficient grounds to entertain a reasonable belief that appellant was acting in concert with two juvenile prostitutes plying their trade when he was found hiding in the back seat of the car driven by one of them, who by prearrangement was to observe while the other was to commit an act of prostitution. We believe this conclusion is demonstrably erroneous.

Additionally, the Court's apparent conclusion that the marihuana evidence seized in this case must be permanently suppressed, regardless of any other evidence the prosecution may be able to produce upon retrial on the issue of probable cause, is an unwarranted interference with orderly state procedure in the handling of criminal cases.

ARGUMENT

I

THERE WAS PROBABLE CAUSE TO ARREST APPELLANT FOR AIDING AND ABETTING THE JUVENILE PROSTITUTES IN THE COMMISSION OF A VIOLATION OF SUBDIVISION (b) OF CALIFORNIA PENAL CODE SECTION 647 AS WELL AS FOR CONTRIBUTING TO THEIR DELINQUENCY IN VIOLATION OF CALIFORNIA PENAL CODE SECTION 272.

While we consider the Court's conclusion that the "frisk" search of appellant for weapons was unreasonable in its scope to involve exaggerated hair-splitting, we accept it as a correct extension of Terry v. Ohio, 392 U.S. 1 (1968), and Sibron v. New York, supra, 392 U.S. 40 (1968). Indeed, in light of Terry and Sibron, it is possible that if this case were before the California Court of Appeal de novo, this same result on the "frisk" question alone would be reached. See, People v. Britton, 264 A.C.A. 843, 70 Cal.Rptr. 586 (1968), hearing denied. But we cannot accept this Court's conclusion that the officers did not otherwise have probable cause to make an arrest.

In 1965 when the trial judge had this case before him, he concluded:

> "But I think the officers had every right to arrest this man without even patting him down or anything else. He was out there operating with a couple of juvenile prostitutes, concealing himself, but it's true the officers spent a lot of time talking about nerve pills

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

in his possession.

> "I think they had the right to make the search, make the arrest." (Reporter's Transcript, p. 5).

We argued, in the California Court of Appeal, the District Court and in this Court, that this conclusion by the trial judge was correct. But the District Court as well as the California Court of Appeal did not pass upon this issue since they found that the "frisk" search and the subsequent discovery of the seconal pills and marihuana was proper. But this Court, without any analysis or citation to any precedent, finds the trial court's conclusion unwarranted. The opinion summarily states:

> "We could not accept the proposition that Tinney's mere presence in the automobile and the resulting inference of his apparent association with the female offenders, standing alone, would supply sufficient probable cause for his arrest. Neither, apparently, could the reviewing California court, for its decision did not so hold." Slipsheet Opinion at p. 5.[1]

A realistic, reasonable approach to this case,

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[1] To conclude, merely because the California Court of Appeal did not pass upon this question, that that court thereby concluded there was an absence of probable cause appears to us to be a wholly unwarranted bit of speculation.

we submit, compels the conclusion that the officers had probable cause to arrest appellant for aiding and abetting the prostitutes in a violation of California Penal Code section 647(b) or for contributing to their delinquency in violation of California Penal Code section 272. This is not a case of "mere association" with or of "mere proximity" to others who are engaged in the commission of a crime. See, People v. Simon, 45 Cal.2d 645, 290 P.2d 531 (1955); Nugent v. Superior Court, 254 Cal.App.2d 420, 426-27, 62 Cal.Rptr. 217 (1967); People v. Ross, 223 Cal.App.2d 196, 198, 35 Cal.Rptr. 254 (1963), hearing denied.

Appellant was far more than a mere innocent bystander. He was hiding in the back seat of a car which was used by two juvenile prostitutes who had entered into an elaborate arrangement for the commission of an act of prostitution in another car in an alley. It is surely naive to conclude that his presence was wholly innocent. Indeed, this Court concluded that appellant's presence in the back seat of the car under the circumstances of this case justified the officer's belief that he was there for the purpose of committing robbery in the alley and that this in turn warranted the "frisk" search for weapons. Slipsheet Opinion at p. 6. We submit that if that fear on the part of the officer was justifiable under the circumstances, a fortiori it was reasonable for him to believe that appellant was acting in concert with the juvenile prostitutes -- i.e., aiding and abetting their

commission of a violation of subdivision (b) of California Penal Code section 647. Incidentally, that offense is committed if an act of prostitution is solicited as well as when actually completed.

The "workable" California rule developed in this type of case is that the "totality of circumstances" must be examined in order properly to assess the existence of probable cause to arrest. People v. Harris, 62 Cal.2d 681, 683, 43 Cal.Rptr. 833, 401 P.2d 225 (1965); People v. Dabney, 250 Cal.App.2d 933, 940-42, 59 Cal.Rptr. 243 (1967), hearing denied; People v. Green, 152 Cal.App.2d 886, 889, 313 P.2d 955 (1967); Montgomery v. Superior Court, 146 Cal. App.2d 622, 623, 304 P.2d 206 (1956); cf. Peters v. New York, reported sub. nom., Sibron v. New York, supra, 392 U.S. 40, 66 (1968). If that totality of circumstances would indicate to a reasonable man with the training and experience of a police officer working in his specialty field that a crime was being committed in his presence, then there is probable cause to make an arrest.

Thus, for example, in People v. Harris, supra, the presence of a suspect's wife in a car parked outside of premises into which her husband entered to purchase narcotics from a known seller was held sufficient to raise an honest and strong suspicion that the wife was her husband's accomplice. And, in People v. Dabney, supra, the defendant attempted to conceal himself from investigating officers (as was done in this case) and this fact was

considered persuasive to the court in reaching the conclusion that he was not a mere bystander but was implicated in a narcotics violation committed by another person.

These California cases, we submit, have established "workable rules" which are in complete harmony with the Fourth Amendment. Regardless of the legality of the "frisk" search viewed alone and by itself, we submit that the issue of probable cause under the "totality of circumstances" must also be addressed. It is respectfully submitted that the cavalier and perfunctory assessment of this question in this Court's opinion does not satisfactorily answer this issue. We earnestly submit that a rehearing be granted and that the Court carefully reconsider the issue of probable cause in light of all of the circumstances. We believe that the "totality" is clearly sufficient to establish probable cause to arrest appellant for complicity in the prostitution offenses. Apropos here is the observation of the Supreme Court in the Peters case: "It is difficult to conceive of stronger grounds for an arrest, short of actual eyewitness observation of criminal activity." 392 U.S. at 66.

II

THE COURT'S ORDER TO THE DISTRICT COURT ON REMAND IS WHOLLY INAPPROPRIATE.

Even if this Court should deny a rehearing and refuse to re-evaluate the issue of probable cause to arrest in light of the "totality of circumstances," we submit that the disposition ordered in this case is unrealistic.

Moreover, it is an unwarranted interference with orderly state criminal procedures.

The Court's opinion concludes with the following paragraph:

> "Upon remand, the District Court will hold Tinney's petition in abeyance in order to afford California authorities a reasonable time, not exceeding thirty days, within which to conduct, if they choose to do so, a new trial in which the unconstitutionally obtained evidence is suppressed." Slipsheet Opinion at p. 8.

We are considerably puzzled by this disposition. The Court's accommodating grant of a thirty day delay before action is to be taken by the District Court, and its invitation to conduct a retrial of appellant, while gracious, is manifestly unrealistic. The charge in this case is possession of marijuana in violation of California Health and Safety Code section 11530. Yet, the Court's disposition of the case seemingly requires that the marihuana evidence which would be the basis for such a prosecution must be suppressed. Are we thus to presume that the prosecution is permanently disabled from establishing probable cause in this case?

It must be remembered that this case was tried by being submitted on the transcript of the preliminary examination. It is common knowledge that the evidence which is introduced at that point is usually sketchy. See People v.

Gibbs, 255 Cal.App.2d 739, 743-44, 63 Cal.Rptr. 471 (1967), *hearing denied*. But the effect of the Court's disposition is to forever preclude the prosecution from introducing additional evidence which, as it may turn out, might overwhelmingly establish probable cause to arrest.

Moreover, the procedure ordered by the Court is technically impossible. At this point there has been no order vacating appellant's judgment of conviction. But the District Court has now been directed to wait thirty days to allow the state to retry appellant before entering an order vacating that judgment. Were we to follow the Court's suggestion and institute a new trial under a new indictment or information, it would appear that appellant would have a quite valid claim of former jeopardy. Further, California Penal Code section 654 would also bar the prosecution.

CONCLUSION

For the foregoing reasons, we respectfully urge this Court to grant a rehearing in banc, to reconsider the issue of probable cause to arrest in light of the totality of circumstances and upon reconsideration affirm the order of the District Court.

DATED: March 14, 1969

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